

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

20200000

**FILE:** B-222523

**DATE:** June 16, 1986

**MATTER OF:** Blinderman Construction Company, Inc.

**DIGEST:**

1. A protest not filed within 10 working days after the protester was orally advised its agency protest was denied is untimely and will not be considered on the merits.
2. General Accounting Office will not consider the merits of an untimely protest by invoking "significant issue" exception to timeliness requirements where untimely protest does not raise issue of first impression which would have widespread significance to the procurement community.

Blinderman Construction Company, Inc. (Blinderman) protests the decision by the United States Army (Army), Office of the Chief of Engineers, Corps of Engineers to permit Keno & Sons Construction Co. to correct a mistake in its low bid under invitation for bids (IFB) No. DACW25-86-B-0004 for cleaning, concrete removal and general rehabilitation of the Joliet Channel Wall along the Illinois Waterway. The Army intends to make an award to Keno at the corrected bid price.

We dismiss the protest.

Bids were opened on December 19, 1985 and Keno was the low bidder in the amount of \$2,167,043.36. Blinderman was second low at \$3,498,708 and the government's estimate for the project was \$3,971,000. On December 19 and 20, the Army contacted Keno and requested Keno to confirm its bid. The Army indicates that on December 30, Keno advised the Army that there might be an error in its bid and requested a meeting with Army personnel to discuss the matter. On January 13, a meeting was held and Keno advised the Army that it had made a mistake of \$391,000 under the General Conditions

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(Contingencies) of Bid Item No. 3, Concrete Removal. The Army advised Keno of the information which must be submitted to support a mistake claim and requested that Keno submit such information on or before January 24, 1986.

On January 16, Keno filed a written request with the Army that it be allowed to correct its bid subject to the Army's acceptance of Keno's "construction methods and schedules." To support its claim, Keno submitted originals of the final bid spread sheets and its computer worksheets on which it calculated its costs for the General Conditions of Bid Item No. 3. On January 20, Keno's president submitted an affidavit attesting to the authenticity of the documents submitted.

The Army advised Keno that it could not retroactively condition its bid and that if it were allowed to correct its bid, Keno would be bound strictly to the terms of the solicitation and in accordance with its submitted bid which contained no qualifying language. On January 23, Keno formally withdrew this request as a condition for acceptance and advised the Army that if correction is allowed, Keno would accept award based on the terms and conditions specified in the IFB and in its bid.

Thereafter, the contracting officer reviewed the information submitted and concluded that Keno had presented clear and convincing evidence of the mistake and the intended bid. On January 27, this recommendation was forwarded to the Army's Office of Chief Counsel, Corps of Engineers, for concurrence.

Blinderman was advised of the contracting officer's recommendation and contacted the Chief Counsel's office to oppose the correction of Keno's bid. After receipt of certain information requested by Blinderman under the Freedom of Information Act (FOIA),<sup>1/</sup> Blinderman submitted a formal protest to the Army on March 10, 1986. Blinderman argued that Keno failed to promptly notify the Army of the alleged mistake and that Keno had improperly attempted to manipulate the Army into allowing Keno to raise its bid price. Blinderman asserted that Keno's mistake claim was submitted as a last resort, that the mistake should have

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<sup>1/</sup> The Army did not provide Blinderman with copies of Keno's worksheets since these contained confidential business information which could prejudice the firm if disclosed to its competitors.

been avoided through the use of reasonable care and that Keno had failed to provide clear and convincing evidence that a mistake had been made or of the bid price actually intended.

The record shows that the Chief Counsel's office requested Keno to submit additional information to support its mistake claim. An affidavit was requested, and provided by Keno, from the individual responsible for the mistake explaining how the mistake occurred. In addition, all original worksheets and documents related to Keno's bid were requested and provided. The documents and affidavits were reviewed and on April 4, 1986, the Chief Counsel's office issued a decision denying Blinderman's protest and permitting Keno to correct its mistake. The Army indicates that Keno was provided telephone notice of this action on April 4 and that written notice was sent on April 9. Blinderman's protest to our Office was filed on April 22.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1985), provide that when a protest is initially filed with a procuring agency, any subsequent protest to our Office must be filed within 10 working days of initial adverse agency action. Ray Comp, Inc., B-221004, Feb. 27, 1986, 86-1 CPD ¶ 205. This is defined as any action or inaction that is prejudicial to the position taken in the protest filed with the agency. 4 C.F.R. § 21.0(e). In addition, we have recognized that oral notification of the bases for protest is sufficient to start the 10 working-day period and a protester may not delay filing its protest until receipt of written confirmation if such a delay would result in its protest being filed after the 10 working day oral notification. Delta Coals, Inc., B-218477.2, Oct. 8, 1985, 85-2 CPD ¶ 388.

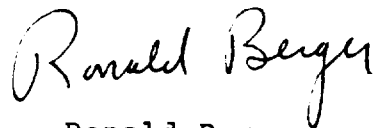
Here, we find that Blinderman was aware of the basis for its protest on April 4 when, by its own admission, Blinderman was orally advised by the Army that its protest had been denied. Although Blinderman argues that it was entitled to wait for receipt of the Army's written decision, the Army's determination to permit correction of Keno's bid, not the Army's explanation of its actions, provides the basis for Blinderman's protest. Blinderman, as evidenced by its agency protest, already had actual knowledge of the facts which formed the basis for its assertion that correction of Keno's bid should not be permitted. Blinderman protested the contracting officer's determination to allow correction and when the Army advised Blinderman that its protest had been denied, Blinderman was

put on notice that correction would be permitted. Since Blinderman's protest was received in our Office on the 12th working day after it was notified that its agency-level protest had been denied, it is untimely and will not be considered on the merits. Freund Precision, Inc.--Reconsideration, B-220238.2, Oct. 28, 1985, 85-2 CPD ¶ 476.

Blinderman asserts that, if untimely, its protest should nevertheless be considered under the significant issue exception to our timeliness rules because the case presents an unusual set of facts. See 4 C.F.R. § 21.2(c). We will review an untimely protest under this exception only where it involves a matter of widespread interest or importance to the procurement community that has not been considered on the merits in a previous decision. Griffin Galbraith, B-218993, Sept. 19, 1985, 64 Comp. Gen. \_\_\_\_\_, 85-2 CPD ¶ 307. The exception is strictly construed and sparingly used to prevent our timeliness rules from becoming meaningless. Dixie Business Machines, Inc., B-208968, Feb. 7, 1983, 83-1 CPD ¶ 128.

Blinderman's protest does not fall within this exception. We have issued numerous decisions in which we considered whether the procuring agency acted reasonably in deciding that correction of a mistake in bid should or should not be allowed. See S.W. Electronics and Mfg., Corp., B-218482, Aug. 12, 1985, 85-2 CPD ¶ 157; Amtech Elevator Services, B-216067, Jan. 11, 1985, 85-1 CPD ¶ 31. Thus, while we recognize the importance of the matter to the protester, we do not consider the issue significant as that term is used in our Bid Protest Regulations.

The protest is dismissed.



Ronald Berger  
Deputy Associate  
General Counsel